U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAT D. PRYOR and TENNESSEE VALLEY AUTHORITY, WIDOWS CREEK PLANT, Chattanooga, Tenn.

Docket No. 96-2082; Submitted on the Record;
Issued February 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's reemployment as a limited-duty conveyor car operator fairly and reasonably represented his wage-earning capacity.

On March 27, 1993 appellant, then a 63-year-old conveyor car dumper operator earning $28,870.00 per year, sustained a lumbar strain in the performance of duty when he slipped while descending a ladder. Appellant received appropriate compensation benefits. On July 5, 1994 appellant returned to work in a light-duty capacity as a conveyor car operator at the pay rate of $29,890.00 per year.

In a report dated January 11, 1994, Dr. Richard A. Bagby, Jr., an Office referral physician and a Board-certified orthopedic surgeon, provided a history of appellant's condition and findings on examination. He diagnosed acute, unresolved lumbar strain episode superimposed on severe degenerative disc disease. Dr. Bagby stated that the employment injury of March 27, 1993 exacerbated appellant's underlying degenerative disc disease and he was having continued exacerbation. He provided a list of work restrictions which included sitting limited to 5 hours a day, walking limited to 2 hours a day, standing limited to 3 hours a day, no lifting over 10 to 20 pounds and no pushing, pulling, bending, squatting, climbing, kneeling or twisting. He indicated that appellant could work for 8 hours a day.

In a report dated March 7, 1994, Dr. Peter E. Boehm, appellant's attending Board-certified neurosurgeon, provided findings on examination and stated that appellant could perform light-duty work with no lifting over 10 pounds and no repetitive lifting and avoidance of bending, climbing ladders and long-distance driving.

By letter dated June 28, 1994, the employing establishment offered appellant a light-duty position and provided a description of the physical requirements of the job which entailed "[s]weeping, cleaning up shops in the plant (Standing). Driving motorized sweeper to clean

main floor in plant (Sitting). Drive to and from post office to pick up mail, drive from one plant to another to take mail. On arrival at plant must climb stairs (1 flight) and walk to distribute mail, attach memos to bulletin boards.… Maximum lifting would be less that 15 pounds." Dr. Boehm signed the position description indicating that the job was within appellant's work restrictions.

On July 5, 1994 appellant returned to work performing the limited-duty conveyor car operator job.

In a report dated July 12, 1994, Dr. Boehm provided findings on examination, noted that appellant was performing limited-duty work and opined that he should continue to perform the limited-duty work.

By decision dated October 11, 1994, the Office adjusted appellant's compensation benefits based upon his reemployment as a conveyor car operator effective July 5, 1994 earning $574.81 per week. The Office determined that the position fairly and reasonably represented his wage-earning capacity and that he had no loss of wage-earning capacity.

In a report dated October 13, 1994, Dr. Boehm noted that appellant was still having right leg pain and had decided to retire from the employing establishment. He did not indicate that appellant was unable to perform his light-duty position.

Effective October 16, 1994, appellant retired from the employing establishment pursuant to an "Early-Out Incentive" program.

By letter dated November 7, 1994, appellant requested an oral hearing before an Office hearing representative.

On February 20, 1996 a hearing was held before an Office hearing representative at which time appellant alleged that he was unable to perform the limited-duty position.

Subsequent to the oral hearing, appellant submitted additional evidence.

In a report dated March 30, 1995, Dr. Boehm provided findings on examination and indicated that appellant had recurrent radiculopathy due to a nerve root compression. He did not indicate that there had been a change in the nature or extent of appellant's employment injury, a lumbar strain or that he was disabled from work.

In reports dated September 19 and 22, 1995, Dr. Boehm noted that a magnetic resonance imaging scan revealed a ruptured disc at the L4-5 level as well as considerable arthritic changes. He did not recommend surgery because appellant was "tolerating this reasonably well." He did not indicate any change in the nature or extent of appellant's employment-related condition nor did he opine that appellant was disabled.

In a report dated March 12, 1996, Dr. Boehm diagnosed chronic continued radiculopathy from a ruptured disc and recommended medication. He did not indicate that appellant was

disabled from work or that there was any change in the nature or extent of his employment injury.

By decision dated April 18, 1996, the Office hearing representative affirmed the Office's October 11, 1994 decision.[1]

The Board finds that the Office properly determined that appellant's actual wages as a conveyor-car operator fairly and reasonably represented his wage-earning capacity.

Under section 8115(a) of the Federal Employees' Compensation Act,[2] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.

In this case, following his March 27, 1993 employment injury, appellant returned to work on July 5, 1994 in a light-duty capacity as a conveyor-car operator. This position was approved by Dr. Boehm, appellant's attending physician, as being within appellant's work restrictions. Appellant performed this job until he voluntarily retired effective October 16, 1994.

There is no evidence that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity during this period.[3] The Board has stated, "generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[4]

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[5] The burden of proof is on the party attempting to show the award should be modified.[6]

In this case, there is no evidence that the Office's October 11, 1994 wage-earning capacity was erroneous or that appellant has been retrained or otherwise vocationally rehabilitated. There is also insufficient evidence to establish that appellant sustained a change in the nature or extent of his employment-related condition. In June 1994, Dr. Boehm approved of the light-duty position as being within appellant's work restrictions. In a report dated

[1] The record shows that the Office received additional medical evidence subsequent to the April 18, 1996 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

[2] 5 U.S.C. § 8115(a).

[3] *See Clarence D. Ross*, 42 ECAB 556 (1991).

[4] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

[5] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[6] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

July 12, 1994, Dr. Boehm opined that appellant could continue to perform the limited-duty work. In reports dated October 13, 1994 through March 12, 1996, Dr. Boehm addressed problems that appellant was having with his back but he did not indicate that appellant was disabled from performing the light-duty job, nor did he indicate that there was a change in the nature or extent of appellant's accepted employment injury.

The April 18, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 1, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member